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LABOUR STANDARDS IN A GLOBALISED ECONOMY SYMPOSIUM

Systemic deficiencies of US FTAs' arbitral labour dispute settlement procedures

The lack of arbitral practice has been the subject of intense analysis in international economic law.

PATRICK ABEL — 11 November, 2015

Deciding international disputes solely on the basis of law while excluding economic and political aspects of power, at least to a large extent, is a concept which can suit arguments between powerful and less powerful states. From this perspective, US free trade agreements are an interesting research topic. Remarkably, from earlier FTAs such as the NAFTA labour side agreement, the North American Agreement on Labour Cooperation (NAALC), to more recent FTAs like the US-Colombia FTA, these treaties often include the possibility of binding inter-state international arbitration in case of a persistent and trade-affecting pattern of failure to meet labour obligations. They often also encompass trade sanctions. However, it is striking to find that, in their more than 20-years-long history, only one case has reached the arbitral phase so far: The recent dispute of US v. Guatemala under the CAFTA-DR.

The lack of arbitral practice has been the subject of intense analysis in international economic law. A comparative analysis from a more general international law-view may contribute to highlight conceptual deficiencies of US FTA's arbitral proceedings. Due to procedural deficiencies, I submit that US FTAs' arbitral labour procedures in large parts fail to effectively promote the protection of labour standards in the trade context.

The relationship between negotiation and arbitration – Politicized arbitration

Firstly, US-FTAs do not really provide state parties with a new option to solve disputes through unilateral resort to arbitration vis-à-vis another state party.

On the international level, different means of dispute settlement suit different situations, and, ideally, are flexibly accessible to meet the particular demands of a particular problem. The WTO is a good example in the trade context in which also US FTAs operate. The WTO DSU not only foresees a judicial procedure, but also diplomatic dispute settlement means such as negotiation, conciliation and good offices. Often, different dispute settlement means are legally connected. Indeed, most international remedies require a failed prior attempt to negotiate before resorting to arbitration or a court. Regularly, such a pre-condition to negotiate has the purpose of giving the potential respondent the chance to react to allegations of a violation of law, and possibly allow for quick and easy mutually agreeable solutions.

From that view, it is not surprising that US FTAs provide for diplomatic dispute settlement procedures that a state must go through before resorting to arbitration. However, US FTAs' obligatory diplomatic stage goes far beyond giving the respondent state a chance to react to allegations. It is better characterized as a tool institutionalizing negotiations between FTA state parties on labour issues. For that purpose, US FTAs require state parties to go through different stages of negotiation, involving different levels of state officials and, possibly, third parties. Usually, negotiations are to be initiated on the ministerial level, and at some point must be filed with the pertinent FTA's Council for consideration on a higher political level. Likewise, most procedures restrict the matters that may be subject to negotiations. All FTAs require state parties to show – in one formulation or the other – a consistent pattern of failure to meet labour standards. Discussing individual labour cases is

not allowed under the system, except for proving a pattern of violations.

The obligatory diplomatic phase thus cannot be interpreted as a functional admissibility criterion for access to arbitration, but is in reality the main instrument of trade-labour dispute settlement envisaged in US FTAs. It follows that the road to arbitration of labour cases is heavily politicized. From a legal point of view, this runs counter to one of the principal functions of arbitration: Depoliticizing and rationalizing the settlement of disputes by considering only arguments of law. From a practical perspective, the dispute settlement rules reflect the parties' lack of political will to create an arbitration system that is effective. Currently, the label of "arbitration" is rather misleading. Arbitration is largely a mere theoretical possibility yet to be explored and developed.

To be sure, the diplomatic procedures provided for in US FTAs themselves may already be seen as a useful diplomatic forum and tool for the settlement of trade-labour disputes. Lore Van den Putte is right in pointing to cooperative measures' possible benefits. Notwithstanding these actual and potential benefits, adding an effective and alternative arbitral option may be a worthy contribution to inter-state dispute settlement especially in situations where states with different economic and political powers are involved. To accomplish this, the procedural prerequisites for access to arbitration must be lowered.

What role for individuals in US FTAs' labour dispute settlement procedures?

Secondly, US FTAs' labour dispute settlement norms do not sufficiently meet individual workers' and labour unions' needs either. Instead, they experience a "disappointment trap", facing their lack of procedural influence and the relatively low impact of the procedures' outcome.

Most labour provisions address concrete working conditions and situations of individuals. This is well illustrated by the example of the prohibition of forced labour, one of ILO's core labour provisions. This norm, like most other labour standards, may well be conceived as an individual human right. Indeed, international human rights treaties often contain provisions that cover such labour issues. However, in US FTAs, labour standards are formulated as obligations owed by one state party to another, fitting the procedural inter-state dimension. Individuals do not hold material or procedural labour rights themselves.

Of course, the reason for this conception is the trade focus of US FTAs. Their main purpose is to promote international trade by reducing trade barriers. Labour conditions must be protected in order to prevent unduly low labour conditions to become a comparative economic advantage, and to preclude a 'race to the bottom' of labour conditions. However, most US FTAs explicitly also envisage to improve workers' rights, in the preamble or in provisions that formulate the respective treaty's goals. FTAs' performance thus should be measured both against its macroeconomic and its individual effects.

In many ways, the US FTAs labour dispute settlement provisions are not well suited to remedy individual labour standard violations. State parties retain full discretion when deciding whether to initiate proceedings and how to

proceed procedurally. Naturally, states take into account other considerations than individuals, including general diplomatic and trade relations and possibly many other issues such as national security. Furthermore, the individual origin of the case is often lost in a merged claim on systemic labour violations. Many cases which were resolved in the diplomatic stage ended with a mutually agreed action plan that proposes general changes to a state party's domestic labour system. Overall, the system envisages general political improvements. It is hardly traceable whether these sufficiently remedy the particular labour standards violations put forward by individuals.

The importance of dispute settlement provisions

Improving general labour conditions is of course a worthy goal. Still, the international regulation of trade and labour has the potential of providing better solutions for individuals and their concrete situations, and furthering the macro-economic treaty goals at the same time – as suggested by Henner Gött in the upcoming post. In the dynamically evolving field of international economic law, the effectiveness of dispute settlement provisions decides over long-term developments of treaty regimes. From this more general perspective, US FTAs' labour dispute settlement provisions and their potential model character for future FTAs such as TTIP or CETA raise also material concerns about the role of labour standards in the future international economic law order. Notwithstanding considerable success of US FTAs' diplomatic dispute settlement means for labour issues, more could be done by also providing for arbitral proceedings that work in practice. If the current deficiencies in that regard are not alleviated, there is a danger that other areas and interests in the long run will dominate or increase

their dominance compared to labour issues, such as international investment protection with its intensively used and efficient investor-state arbitral procedures.

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